In the Matter of	)	Date issued: **SEPT. 6, 1996**
	)	
ROBERT MICHAUD,	)	**RECOMMENDED DECISION AND ORDER**
	)	
Complainant,	)	
	)	Case No. 95-STA-29
vs.	)	
	)	
BSP TRANSPORT, INC.,	)	
	)	
Respondent.	)	
_____	)	

Appearances:

Louis B. Butterfield, Esq.
75 Pearl Street
P.O. Box 130
Portland, ME 04112
(207) 761-4411

For Complainant

Lawrence C. Winger, Esq.
Kraft & Winger
10 Moulton Street, Sixth Floor
Portland, ME 04101
(207) 761-2500

For Respondent

Before:

Christine McKenna
Administrative Law Judge

I. JURISDICTION

This proceeding arises under the "whistleblower" employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 [hereinafter "the Act"], 49 U.S.C. App. § 31105 (1994 Repl.), and the applicable regulations at 29 C.F.R. Part 1978.

II. PROCEDURAL HISTORY

Complainant Robert Michaud filed a complaint of discrimination under Section 405 of the Act with the Department of Labor, alleging he was discharged by respondent for having complained of "hours of service" violations. The complaint was investigated and found to have merit, and on April 10, 1995 the Secretary issued his Findings and Preliminary Order [ALJX 1].[1] Respondent filed timely objections and requested a hearing pursuant to 49 U.S.C. §31101(c)(2)(a) [ALJX 3, 4]. The case went to hearing before the undersigned administrative law judge on February 20, 1996 in Bath, Maine.

The record consists of ALJX 1-36; CX 1-15, 18, 20, and 24; RX 2, 3A and 3B, 4-6, 8, 10, 12, and 14; and the 855-page transcript of proceedings from February 20 through 22, 1996.[2]

III. STIPULATIONS, MATTERS IN DISPUTE, AND THE PARTIES' CONTENTIONS

A. Stipulations

The parties have stipulated as follows [ALJX 28]:

This matter arises under the Surface Transportation Assistance Act, 49 U.S.C. §31105 [hereinafter the "STAA" or the "Act"]. The U.S. Department of Labor, Office of Administrative Law Judges, has personal and subject matter jurisdiction over the parties and the dispute, pursuant to the Act and under 29 C.F.R. Part 1978. The federal rules and regulations governing operators' "hours of service" for commercial motor vehicles are set forth in 49 C.F.R. Part 395.

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[1] References in the text are as follows: "ALJX ___" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judges; "CX __" refers to claimant's exhibits; "RX __" to respondent's exhibits; and "TR __" to the transcript of proceedings February 20-22, 1996.

[2] CX 16, 17, 19 and 21-23 were not admitted; RX 1, 7, 9, 11 and 13 were not admitted [TR 850-851]. The following ALJ exhibits were admitted post-hearing:

ALJX 31: Correspondence dated 2/26/96 from ALJ to both counsel
ALJX 32: Correspondence dated 3/19/96 from Butterfield to ALJ
ALJX 33: Respondent's post-trial brief
ALJX 34: Complainant's post-trial brief
ALJX 35: Stipulation regarding back wages
ALJX 36: Correspondence dated 5/29/96 from Winger to ALJ

Respondent BSP Transport, Inc. [”BSP”], is a New Hampshire corporation with its principal place of business in Manchester, New Hampshire. BSP is engaged in the business of both intrastate and interstate commercial trucking operations for the transportation of a variety of general freight. As part of its regular course of business, BSP employs individuals to operate commercial motor vehicles in both intrastate and interstate commerce in the transportation of general freight as a contract carrier. BSP owns and operates five terminals in Maine, New Hampshire and Vermont. One of the five terminals is located in the City of Westbrook, Maine and is known as the “Westbrook Terminal.”

Complainant’s employment with BSP began on July 7, 1993 and ended on December 23, 1993. His wage rate at the time of termination was $9.50 per hour.

BSP employed complainant Robert Michaud at the Westbrook Terminal as a Class A operator, whose duties were primarily the transportation of air freight between the Westbrook Terminal and points in Massachusetts and, occasionally, in New Hampshire. Complainant’s duties as a Class A driver for BSP included driving “commercial motor vehicles” as that term is defined under the Surface Transportation Assistance Act of 1982 [the “STAA” or the “Act”], 49 U.S.C. §31101(1), in that complainant operated self-propelled or towed vehicles with gross vehicle weight ratings of 10,000 or more pounds used principally to transport cargo on the highways and in commerce. During the period of his employment with BSP, complainant was an “employee” within the meaning of the Act, 49 U.S.C. §31101(2), in that he was a driver of a commercial motor vehicle who directly affected commercial motor vehicle safety in the course of his employment for BSP.

BSP is now and was at all times material to this litigation, an “employer” within the meaning of the Act, 49 U.S.C. §31101(3), in that it engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with the business, or assigns an employee to operate the vehicle in commerce.

Specifically regarding lost wages, the parties have stipulated as follows [ALJX 35]:

1. Had complainant continued employment with BSP after December 23, 1993, he would have

    a. received two raises: (1) to $10.00 per hour effective Week 21 of 1994; and (2) to $10.50 per hour effective Week 16 of 1995.

    b. been entitled to receive pay at time and one-half rates for hours worked over 45 hours per work week.

c. received, beginning January 1, 1994 and continuing until December 1995, health insurance having a net value to complainant of $369.00 per month, or $85.15 per week. Beginning January 1996 and continuing to the present, the net value of such health insurance rose to $399.00 per month, or $92.08 per week.

d. Worked the following average hours per week:

Last week of December 1993 to March 1994:	53.13
April 1994 to December 1995:	50.85
January 1996 to present:	50.75

2. Complainant's back wages from December 23, 1993 through December 31, 1995 are $66,204.38. Back wages from January 1, 1996 and continuing are $655.14 per week.

3. Had complainant accepted respondent's offer of reinstatement dated May 1,1995, he would have returned to work in week 19 of 1995.

B. The parties' contentions:

1. Complainant:

Robert Michaud contends that he engaged in protected activities by reporting to several persons in BSP management that its policies and practices either required or permitted drivers to violate federal hours-of-service regulations. In particular, BSP violated the 100 air-mile radius rule, and failed to require its drivers to maintain daily log forms even though they worked more than 12 hour shifts. Upon the advice of state and federal enforcement personnel, he began to gather documentation to substantiate his complaints of violations. BSP fired him on December 23, 1993, upon discovering that he was making photocopies of BSP documents in order to substantiate his complaints.

BSP's argument that it fired him for photocopying "confidential" materials is a pretext. The company never treats either drivers' time cards or truck manifests as "confidential:" drivers routinely copy them in the course of their work; they are often posted on site; and the information on them is available through other documents. Nor was there any written or oral policy that they were confidential documents and that photocopying them was prohibited.

As a result of the discharge, complainant has suffered considerable emotional distress, for which he has sought treatment, as well as financial setbacks due to the need to incur debt in order to sustain his family.

2. Respondent

Robert Michaud did not engage in protected activity. The statute protects only employees who have filed a complaint or begun a proceeding concerning a safety violation; or refused to work because of a perceived violation. Complainant did neither. Even assuming some of complainant's activities were protected, (1) some of those activities were not known to respondent at all and (2) the remainder were not known to the decision-maker, Michael Greany. It is complainant's burden to show that the protected activity was known by Greany; this the complainant cannot do.

Even if Mr. Greany knew about some protected activity by complainant, such was not the motivating factor in complainant's discharge. The reason BSP discharged complainant was because of his unauthorized and secret copying of its confidential business records. BSP had reason to believe that complainant was lying about his reason for copying the records, and had reason to believe he was about to quit his job at BSP and take confidential information to a competitor.

Regarding damages, complainant is limited to back pay from the date of his discharge, December 23, 1993 to May 1, 1995, when BSP made an unconditional offer to reinstate him. He is not entitled to compensatory damages for medical problems, because they were not caused by the discharge: though discharged in December 1993, he did not seek treatment until February 1995, and that was initially for a skin rash.

C. Issues and disputed matters:

1. **Liability**: Whether on December 23, 1993, respondent BSP Transport, Inc. discharged, disciplined, or discriminated against complainant Robert Michaud regarding pay, terms or privileges of employment because he engaged in activities protected under 49 U.S.C. §31105(a)(1)(A)? Specifically, the parties dispute:

    a. Whether complainant's conduct prior to December 23, 1993 constituted activities protected under 49 U.S.C. § 31105(a).

    b. Whether respondent knew of complainant's having engaged in any activities protected under 49 U.S.C. § 31105(a).

c. The nature of BSP's motivation to terminate complainant's employment on December 23, 1993.

2. **Damages**: If respondent is found liable for violation of the Act, what are the appropriate remedies and damages?

a. Whether complainant is entitled to back pay pursuant to 49 U.S.C. §31105(b)(3), and if so, the amount of such back pay?

b. Whether complainant is entitled to front pay in lieu of reinstatement, pursuant to 49 U.S.C. §31105(b)(3)(A)(ii), and if so, the amount of such front pay?

c. Whether complainant is entitled to recover, as *"compensatory damages"* pursuant to 49 U.S.C. §31105(b)(3)(A)(iii), for

i. emotional suffering, psychic injury and medical expenses and if so, the amount of such damages.

ii. Interest on debt attributable to the termination of his employment, and if so, the amount of such damages.

IV. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

There being adequate support in the record for the parties stipulations in Paragraph III herein, those stipulations are hereby incorporated by reference into this Paragraph IV as Findings of Fact and Conclusions of Law, as if fully set forth.

A. STAA violations -- Overview

A complainant may recover under the Act under three circumstances, only the first two of which are invoked by complainant Robert Michaud in this case:

First, by demonstrating that he was subject to an adverse employment action because he has filed a complaint alleging violation of safety regulations. 49 U.S.C. § 31105 (a)(1)(A). This provision of the Act provides specifically and in pertinent part:

> **(a) Prohibitions. -- (1)** A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because --
>
> > **(A)** the employee, , has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, ...

Second, by demonstrating that he was subject to an adverse employment action for refusing to operate a vehicle "because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. 31105(a)(1)(B)(I).[3]

Third, by showing that he was subject to an adverse employment action for refusing to operate a motor vehicle "because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." 49 U.S.C.§ 31105(a)(1)(B)(ii). To qualify for protection under this provision, a complainant must also "have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C 31105(a)(2).[4]

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and, more recently, in St. Mary's Honor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993). See Anderson v. Jonick & Co., Inc., 93-STA-6 (Sec'y, September 29, 1993). Under this model, the complainant must, at the outset and at a minimum, "... set forth facts which justify an inference of retaliatory discrimination," that is, the existence of protected activity and an inference of a causal connection with that activity and adverse employment action, in order to establish a *prima facie* case. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y, December 15, 1992), slip. op. at p. 2.

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[3]Before the Act was recodified in 1994, this provision prohibited adverse employment action against an employee for refusing to operate a vehicle "when such operation constitutes a violation of any Federal rules..." (emphasis added). For this reason, it was often referred to as the Act's "when" clause. The legislative history of the recodification makes it clear that the substantive law of the Act is intended to remain unchanged. H.R. Rep. No. 180, 103rd Cong., 2d Sess. 5 (1994).

[4]This provision has traditionally been referred to as the "because" clause, although the 1994 recodification would appear to make this distinction -- between the "when" and the "because" clauses -- impractical. See Note 4, *supra*. Mr. Michaud does no6t invoke protection under the "because" clause.

While proof of a *prima facie* case is a predicate for shifting the burden of production to the employer, it is well established that proof sufficient to show a *prima facie* case is not enough to establish the claim itself. Claimant must demonstrate retaliatory, discriminatory action in violation of the statute, and always bears the ultimate burden of persuasion. Saint Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973). The four key elements of the *prima facie* case, then, are that

(1) the employee engaged in protected activity;
(2) the employer knew of the protected activity;
(3) the employee was subjected to adverse action; and
(4) the protected activity was the likely reason for the adverse action.

Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y December 15, 1992).

Once the complainant satisfies these four elements, a rebuttable presumption of discrimination arises, and the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof.

Once the employer produces such evidence, the *prima facie* case analysis is no longer particularly useful. USPS Board of Governors v. Aikens, 460 U.S. 711, 714 (1983); White v. Maverick Transportation, Inc., 94-STA-11 (Sec'y, February 21, 1996). The burden of production shifts back to the complainant to establish that the employer's proffered reason is pretextual or otherwise not legitimate, and the "real battleground" revolves around whether the reasons articulated by respondent are pretextual and whether complainant has met his ultimate burden of proof. Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y February 15, 1995) slip op. at p. 12, *aff'd* 78 F.3d 352 (8th Cir. 1996); Olson v. Missoula Ready Mix, 95-STA-21 (Sec'y, March 15, 1996); Etchason v. Carry Companies of Illinois, Inc., 92-STA-12 (Sec'y, March 20, 1995). The complainant ultimately prevails only if he successfully rebuts the legitimacy of respondent's explanation. With only one exception, the burden always remains with the claimant to establish the elements of his case: (1) protected activity; (2) a causal nexus between the protected activity and the adverse action; and (3) in response to employer's evidence of an allegedly legitimate reason for its action, evidence of pretext.

The one exception to the claimant's burden of proof arises under the "dual motive" analysis: once the evidence shows that the proffered reason is not legitimate, and that the

discharge was motivated at least in part by retaliation for protected activity, then the employer must establish by a preponderance of the evidence that it would have discharged the complainant independently of his protected activity. Faust v. Chemical Leaman Tank Lines, Inc., 93-STA-15 (Sec'y April 2, 1996); Moravec v. HC & M Transportation, 90-STA-44 (Sec'y, January 6, 1992), slip op. at 12, N. 7.

The record must be examined in light of the foregoing standards. In this regard, it is essential to set forth the context in which this dispute arose.

B. The hours of service regulations:

The Department of Transportation regulations promulgated to implement the STAA provide at 49 C.F.R. Part 395 in pertinent part as follows:

> ***§ 395.3 Maximum driving and on-duty time***
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> (a) ..., no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:
>
> (1) more than 10 hours following 8 consecutive hours off duty; or
>
> (2) for any period after having been on duty 15 hours following 8 consecutive hours off duty;
>
> (b) No motor carrier shall permit or require a driver of a commercial motor vehicle, ... , to drive for any period after --
>
> (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate every day in the week; or
>
> (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates motor vehicles every day of the week.
>
> ***§ 395.8 Driver's record of duty status***

(a) Every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24- h o u r period using the methods prescribed in either paragraphs (a)(1) or (2) of this section.

> (1) Every driver who operates a commercial motor vehicle shall record his/her duty status, in duplicate, for each 24-hour period. The duty status time shall be recorded on a specified grid, ... [the Daily Log Form may continue to be used]...

(f) Failure to complete the record of duty activities of this section or § 395.15, failure to preserve a record of such duty activities, ... shall make the driver and/or the carrier liable to prosecution.

§ 395.1 Exemption from requirements of § 398.8

(e) *100 air-mile radius driver*. A driver is exempt from the requirements of § 395.8 if:

> (1) The driver operates within a 100 air-mile radius of the normal work reporting location;
>
> (2) The driver, ..., returns to the work reporting location and is released from work within 12 consecutive hours;
>
> (3) at least 8 consecutive hours off duty separate each 12 hours on duty;
>
> (4) The driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and
>
> (5) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing [the time

the driver reports to and is released from work;
and the total number of hours on duty]

C. The situation at Westbrook Terminal and the events during complainant's employment:

During the summer and fall months of 1993, BSP's Westbrook Terminal was in considerable transition and flux in terms of management personnel, employee relations, and union activity.

A union election had taken place at the Westbrook Terminal at the end of April or early May 1993. The union campaign was ticklish, in that the employees were in two camps opposing one another, as a result of which upper management felt somewhat constrained in its dealings with either camp [TR 791-793, 798].[5] The union vote was contested and a second election was ordered to take place [TR 526, 790]. Shortly thereafter, in May 1993, BSP owner, Jack Law, asked Michael Greany, vice president of finance and administration at the company's Londonderry office in New Hampshire [TR 45], to visit the terminal to assess the situation. Greany discovered that the terminal manager, Ed Paul, was overwhelmed by personal problems and not managing the facility. The employees at Westbrook felt totally shut out and unable to communicate with management. [TR 717-718] Greany described the terminal as a "mess" both physically and financially: no one was in charge and dispatch was in disarray [TR 719-720].

Both Greany, who was about to be appointed acting terminal manager, and complainant Robert Michaud came into a trucking facility that was struggling when they began work at Westbrook Terminal in the summer of 1993 -- Mr. Michaud unknowingly. In addition to considerable employee unrest, virtually all personnel in management positions were being replaced by people with little, if any, administrative experience:

In June 1993, Ed Paul was relieved of his duties as terminal manager.[6] Michael Greany became terminal manager on a provisional basis in early July 1993, for a three month period, although he had no operations experience [TR 46, 713-714, 782] Glenn Osterberg was appointed second shift supervisor to replace Burleigh Dudley [TR 527, 721-722]. The

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[5]BSP witnesses testified that this circumstance did not affect the on-line supervisory staff. Alex Kasny testified that he was advised to handle day-to-day operations and personnel matters as usual [TR 527], and Greany confirmed that it did not affect the company's ability to take adverse employment actions in the normal court of business [TR 796].

[6]Paul became safety director several weeks later [TR 730-731].

day dispatcher/supervisor, Bob Davis had cancer and was replaced by David Andrews in August 1993 [TR 432. 618, 722].

The company president offered Alex Kasny, a former truck driver, the position as operations supervisor in mid- to late-September 1993, although Kasny had no management experience [TR 425, 431, 722, 725]. Kasny admitted that he was inexperienced in management duties and often sought Michael Greany's advice. He was also not in favor of the union [TR 434, 470-71] As a result of Kasny's inexperience, Greany's three month hitch as acting terminal manager was extended [TR 725]. Greany split his time between Westbrook and Londonderry, performing the duties of his administrative job as well as those of terminal manager [TR 54, 433]. By the fall of 1993, Greany had three supervisors at Westbrook -- Osterberg, Andrews and Kasny -- whom he described as experienced drivers "without a clue" about administration, referring to Kasny as more of a "student" than a supervisor [TR 732, 782; see also TR 434, 470]. The upshot was that during the summer and fall of 1993, the acting terminal manager was "clueless" about trucking operations, and his on-site supervisory staff were equally uninformed about management.

Greany testified that although it was his responsibility to know the Federal transportation [DOT] regulations, including those concerning "hours of service," he was not even aware of their existence and there were no policies or procedures in place regarding those rules during the times material to this matter [TR 46-49, 563]. He said he was not aware of any "hours of service" issue until Mr. Michaud's complaint came in from the Department of Labor [TR 744, 782]. His goal was to rehabilitate the terminal and to keep BSP's customers pleased. Andrews and Kasny testified that they knew about the regulations, however, from their previous experience as truck drivers [TR 560, 631].

Robert Michaud was hired effective July 7, 1993, and within a few weeks began driving runs from Westbrook to Logan Airport in Boston. He worked the second shift -- the one immediately following the day shift -- driving the first or second airport trucks [TR 537]. He testified that he first became concerned about the "hours of service" rules after his 90 day evaluation in October 1993, when he signed certain documents advising of those rules [TR 74]. He claimed he then inquired about them of his supervisor, Glenn Osterberg, as well as. Alex Kasny. According to Mr. Michaud, Kasny told him that the DOT rules did not apply to BSP's runs because of an exemption under the New Hampshire Railway Act, a statement later echoed by Osterberg. [TR 80-82, 90-92]. Complainant claimed he spoke to a state trooper and to a woman named Susan at the U.S. Department of Transportation. The trooper told him that the hours he was driving would violate the regulations, and Susan confirmed that he could not exceed 60 hours a week or 12 hours a day [TR 69, 73, 87]. It was after that, he said, that he knew he was violating the hours of service rules.

Although complainant says he spoke about this issue to many persons at BSP management, such as Osterberg, Kasny, David Andrews, Jack Law and Michael Greany, he points to a conversation with safety director, Ed Paul, as unequivocally constituting a report of violation. He went to Paul in early November, 1993, shortly after his 90 day review in October, complaining about the "vicious cycle" created by the domino effect of four factors: first, drivers returning from the day shift in empty inbound trucks invariably arrived late from finishing their runs; second, the empty trucks then needed to be loaded and readied to leave on outbound runs on the next (or "second") shift; third, as a result, the outbound runs on the second shift left late; fourth, as a result, second shift drivers such as complainant, driving outbound runs, were forced to speed in order to complete their runs within the hours of service rules. [TR 95-100]. He mentioned to Dave Andrews that the trucks from the previous shift should be brought in earlier, and claims that Andrews agreed [TR 105-106]..

At the same time, he testified, Kasny continued to insist that the DOT regulations did not apply to BSP and told him to "get [that idea] out of his thick skull." The latter comment occurred at a time when Kasny was concerned about losing a substantial customer and asked complainant and one other driver, Larry Roy, to alter their hours, coming in earlier in the afternoon to do local runs [TR 107-109]. After Kasny's "get it out of your thick skull" comment, and Kasny's insistence that he start his job two hours earlier, complainant said he knew he had to get another job [TR 109].

Kasny denies ever discussing the New Hampshire Act or hours of service regulations with complainant [TR 448-449, 455-459, 481-482]. He testified that he himself was aware that drivers needed to keep a log if they drove more than 12 hours, even in a 100-mile radius [TR 560].

All the while, union activity continued. The first union election was nullified, and a second election due to be held in early November 1993 [TR 526]. The central issue in the campaign was a pay raise. Complainant was pro-union and active in the campaign [TR 705-707]. One comment on his October 1993 evaluation was that he spent a lot of time talking to other drivers when he should have been working [RX 14].[7] Kasny described complainant as "talkative" and offering numerous unsolicited bits of advice on running the terminal [TR 444, 482-483, 555-556]. The BSP witnesses testified that complainant was disappointed at his October 1993 evaluation because he expected a large raise. Complainant and his wife had learned shortly before that they were expecting a surprise late-life baby, and he

[7]Complainant testified that no negative comment, including those about his talking too much on the job, and the quality and quanity of his work, was on his performance appraisal paperwork he looked at it and signed it during his October evaluation [CX 3; TR 91-94].

conceded that he had financial concerns as a result [TR 172]. To the BSP supervisors, complainant seemed very anxious about making more money. Over the next couple of months, Kasny said, complainant spoke numerous times about the need to get another job, to the point where it was "aggravating day-to-day operations." [TR 461-465, 550]

According to complainant, he began copying company records, which he did not consider confidential, on December 23, 1993 to gather documentation of the company's hours of service violations. He planned to file a complaint with the Department of Transportation in March 1994 [TR 188]. He admitted that he was doing the photocopying in secret to make sure that the company did not know what his plan was [TR 189]. He felt that if he were caught by a manager copying the company's documents, he would be fired and "out the door." [TR 129, 189-190].

Complainant was seen doing the photocopying by Danny Vaughan, who was working the night shift [TR 671-674]. In an "up-the-line" information relay, Vaughan passed the information on to Dave Andrews, who told Alex Kasny [who then checked it out directly with Vaughan], who then called Michael Greany, advising that company records, including manifests, were being copied [TR 498-511, 574-590, 603-609, 625-629, 671-674,734-744, 771-777]. Greany advised Kasny to confront complainant and ask directly whether he had been copying time cards and/or manifests. According to Kasny, complainant evaded the question and avoided answering directly [TR 508]. Kasny testified that there was no mention of "hours of service" during this conversation [TR 511]. Complainant admits that he copied time cards without permission, and that he was evasive and not entirely truthful when confronted by Kasny and Osterberg [TR 199-204]. He admits that he finally disclosed tht he had been copying time cards of other drivers, and at least one manifest, which he said was his own [TR 202]. He also admits that he never told BSP that he intended to file a complaint with the Department of Transportation over the violations, and never informed management about his alleged contacts with "Susan" at DOT and the state trooper [TR 239-240].

B. The elements of Complainant's case:

(1) Protected Activity

a. Whether internal complaints to BSP management constitute protected activity:

BSP argues [ALJX 33] that in order to constitute protected activity, complainant must have "filed a complaint or begun a proceeding" with the Department of Transportation. It

is undisputed that Mr. Michaud never did so; ergo, BSP asserts, his claim must fail as a matter of *law.* This argument is not supportable, given the remedial purposes of the Act. As complainant correctly notes, the protections of the Act would be undermined if employers were allowed to discharge, with impunity, employees who have voiced safety concerns but had not yet had a chance to contact government officials.

It is well established that internal safety complaints to the employer's management tier constitute protected activity. The Secretary and the federal circuits have held that the Act does not restrict its protection only to those who file formal complaints with the government. See White v. Maverick Transportation, Inc., 94-STA-11 (Sec'y, February 21, 1996). The Secretary has specifically held that inquiries as to whether certain runs violate the Federal hours-of-service regulations at 49 C.F.R. Part 395 constitute protected activity. Faust v. Chemical Leaman Tank Lines, Inc., 93-STA-15 (Sec'y, April 2, 1996); Stiles v. J.B. Hunt Transport, 92-STA-34 (Sec'y Sept. 24, 1993), slip op. at 4 (noting that it would be inconsistent with the purpose of the Act to limit protection to complaints filed with government agencies, since a complaint to an employer is the initial step in achieving safety).

Further, a person need not cite specific motor vehicle standards or rules to be protected, but need only cite safety concerns. Nix v. Nehi-RC Bottling Company, 84-STA-1 (Sec'y July 13, 1984), slip op. at 8-9. This activity is protected even if the underlying complaint proves to be meritless. Hernandez v. Guardian Purchasing Co., 91-STA-31 (Sec'y June 4, 1992), slip op. at 3 n.1. See also Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y August 31, 1992); Hamilton v. Sharp Air Freight Serv., Inc., 91-STA-49 (Sec'y July 24, 1992), slip op. at 1-2.

b. Whether complainant in fact made complaints to BSP management:

The employer argues in addition that the complainant did not engage in protected activity as a matter of *fact*. The evidence is discrepant among the witnesses, and the credibility of the witnesses determines where the weight of the evidence lies. While assessing credibility is essential in terms of whether complainant has satisfied his ultimate burden of proof in this case, it is less so in terms of the *prima facie* case. The initial burden in establishing a *prima facie* case is not onerous. Ertel v. Giroux Brothers Transportation, Inc., 88-STA-24 (Sec'y February 16, 1989). The complainant need only present evidence sufficient to prevail if not overcome by other evidence. Thus, the complainant's own testimony that he registered concerns about hours of service violations is sufficient to establish the "protected activity" element of his *prima facie* case. Toland v. Burlington Motor Carriers, Inc., 93-STA-35 (Sec'y February 27, 1995); Ass't Sec'y and Brown v. Besco

Steel Supply, 93-STA-30 (Sec'y, January 24, 1995); Ertel v. Giroux Brothers Transportation, Inc., 88-STA-24 (Sec'y February 16, 1989).

For purposes of his *prima facie* case, complainant has established that this activity was protected under Section 31105 (a)(1)(A) of the Act.

c. Whether complainant in fact refused to operate a vehicle because to do so would violate Federal motor carrier regulations:

Mr. Michaud testified that in late November 1993, Kasny asked him and other drivers on the second shift to start their shifts two hours earlier, coming in at 3:00 p.m. rather than 5:00 p.m. and working until 5:00 a.m. [TR 106-109]. Complainant testified that he registered his concern about the extended shifts with Glenn Osterberg, and that he did not want to work a 14 hour shift. Claimant's own testimony suggests that his comments and conduct did not rise to a refusal. He admits that the very next day, his supervisor arranged for him to stay on the original schedule such that his hours never changed and he never actually declined a single run [TR 232-233]. Nevertheless, given the complainant's light burden at this stage, and the remedial purposes of the Act, I find that his disagreeing with Kasny about whether to take an earlier shift amounts to a refusal for purposes of the *prima facie* case.

(2) Adverse Employment Action

Respondent does not dispute that it discharged complainant on December 23, 1993. The record adequately supports a finding of adverse employment action.

(3) BSP's Awareness of the Protected Activity

As discussed above, complainant's testimony is sufficient, for purposes of his *prima facie case*, to establish that he informed BSP management of his concerns about the Federal safety regulations. I do note that Mr. Michaud concedes that he has no evidence that at the time of his discharge, BSP actually knew the purpose for which he was photocopying the company's records, because he lied about it. It was complainant's assumption and opinion that BSP had to have figured out his intent to go to DOT with an hours of service complaint and fired him as a result [TR 191].

(4) Causation

Because it is rare that a complainant can produce direct evidence establishing a connection between protected activities and an adverse employment action, it is well established that a complainant may prove such a connection with circumstantial evidence. Clay v. Castle Coal & Oil Company, 90-STA-37 (Sec'y Nov. 12, 1991), slip op. at 6 n.5. Temporal proximity is sufficient as a matter of law to establish the final element of the *prima facie case*, the inference of a causal nexus between the protected activity and the adverse employment action. Couty v. Dole, 886 F.2d 147 (8th Cir. 1989).

In this case, complainant testified that he began to register his concerns about the regulations in October 1993, and continue to voice them to various persons in BSP management. Then, on the day of his discharge, he was fired directly after being seen and confronted about copying company documents, which he testified he was doing to document his anticipated complaint to the Department of Transportation. While an immediate discharge will almost always justify drawing the inference of causation, the Secretary has held that a delay of six days, one week, six weeks or even two months between the protected activity and the discharge does not negate the inference. The evidence of temporal proximity in complainant's case in chief is sufficient to raise the inference that his discharge was motivated by his engaging in activity protected under the Act.

I therefore find that the complainant has satisfied each and every element of his *prima facie* case.

C. BSP's stated reason for discharging complainant

Because complainant has established a prima facie case of retaliatory discharge, the burden shifts to BSP to produce evidence that the discharge was motivated by a legitimate, non-prohibited reason.

According to Michael Greany, the reason he discharged Robert Michaud on December 23, 1993 is that Alex Kasny telephoned and informed him that Michaud had been seen photocopying BSP internal documents from the company's files, specifically, manifests and other drivers' time cards. Greany himself had had no conversations with complainant about hours of service or regulatory concerns, and this subject was not on his mind as the events around the discharge evolved. Rather, Greany was aware that complainant was anxious to make more money and that he was looking for a new job. He discussed the situation with company owner, Jack Law; the concern of Greany and Law was the critical information contained on the manifests, which they considered confidential, and whether that information could be taken to a competitor to be used for profit. Greany was concerned about the situation, because there was no legitimate need for complainant to be copying

manifests at any time, particularly that time of night. Greany then telephoned Kasny back, advising him to confront complainant and ask him exactly what he had been copying. Kasny reported back that complainant had reluctantly admitted photocopying time cards and manifests. At that point, Greany told Kasny to dismiss complainant [TR 734-744, 767, 771-777].

I find that BSP has articulated legitimate, non-prohibited reasons which at least in part motivated complainant's discharge. Concern for the integrity of internal business information is on its face a valid reason for adverse employment action. BSP has articulated a non-prohibited reason for its adverse employment action sufficient to confront complainant's *prima facie* case and put Mr. Michaud to his burden of proof.

D. Whether complainant has satisfied his ultimate burden of proof on the elements of his claim.

(1) Protected activity:

whether the evidence establishes (1) that "complaints" and/or "refusal" took place; and (2) the likelihood of hours of service violations.

As indicated previously, the testimony of the witnesses is conflicting as to whether complainant actually registered any concerns with BSP management about the hours of service rules, or refused to drive an extended shift because of a perceived violation of such rules. It is well settled that it is within the province of the fact finder to determine the credibility of the witnesses, to weigh the evidence in this regard, and to draw her own inferences from this evidence. Banks v. Chicago Grain Trimmers Assoc., Inc., 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968).

(I) "complaints"

Mr. Michaud testified that he discussed the hours of service problem with numerous management personnel at BSP. Yet the context in which any statements were made suggests that those statements expressed not so much a concern for regulatory violation but an explanation for complainant's inability to get the job done. It is significant to me that Mr. Michaud drove for over three months without, he admits, any concern about the 12 hour rule. His testimony is that it was not until he had his performance evaluation in October 1993 that the light dawned and he realized that he had been "running illegal." However, the comment on the October evaluation was that he could use his time better in terms of loading at the

dock and delivering at Logan Airport, by prioritizing so that he could deliver logically and on time [TR 444-447]. Thereafter, in early November, Mr. Michaud says he explained to Ed Paul that the problem really lay with the "vicious cycle" caused by the day shift drivers' coming in late. Apparently he talked to others about the "vicious cycle" as well. Complainant's description of his conversation with company owner, Jack Law, had to do primarily with long hours and the pay raise being sought by the pro-union contingent [TR 102-104].

In this regard, the evidence also suggests a conflict between Kasny and Michaud about who was in charge of how he would perform his work. In October 1993, Kasny had been terminal manager for less than one month, and was very much in the learning stages of that job. As recently as September 1993, Kasny had been a truck driver and co-worker alongside Mr. Michaud. Kasny himself had driven the run to Logan Airport for the prior 18 month period, and found that he could accomplish it in 10 to 11 hours [TR 428-430]. On the witness stand, Kasny steadfastly refused to concede that Michaud's run involved more work, despite the fact that Kasny went to the airport unloaded and made only one stop, whereas Michaud had to load at the terminal and make several deliveries at the airport.

Kasny did admit that often Michaud did not leave the terminal on time, and that he and other drivers were having trouble getting to the airport in time to drop off freight before the forwarders closed [TR 521-533]. As a result, in late November or early December 1993, Kasny approached Michaud and another driver, asking whether they would be willing to start their run two hours earlier in order to provide better service to the airport customers, getting their freight delivered more quickly. Mr. Michaud interpreted this as meaning that two hours would be added to his run, making for a 14-hour day [TR 228] whereas Kasny conceived of it as merely moving the entire run up two hours [TR 484-490].

At the same time, Michaud was pro-union and Kasny anti-union [TR 102, 556]. The record very much suggests Kasny was tense over the union campaign and general unrest at the terminal; over his inexperience in a position of authority; and over Michaud's numerous unsolicited suggestions about how to run the terminal. Michaud described Kasny's manner as "forceful" and his language "strong" [TR 93-95]. Michaud admitted that he had personal tension as well, in that he was concerned about finances and the baby that was due in March 1994. As a result, in December 1993 he told Osterberg and later Kasny that he was looking for a job to make more money; he admits that he kept to himself his alleged intent to file a complaint with DOT about hours of service [TR 243-253].

While internal complainants to management are protected under the STAA, there are many ways an employee can communicate such complaints to an employer. Some

statements by the employee are too vague, tenuous or attenuated to be perceived as complaints or do not represent the type of communication that qualifies as a complaint under the STAA. White v. Maverick Transportation, Inc. 94-STA-11 (Sec'y, February 21, 1996). If the preponderance of the evidence established that Mr. Michaud complained about "running illegal" or going over the 12 hour rule, that would suffice as a "complaint" for purposes of Section 405 of the Act. Ass't Secretary and Waldrep v. Performance Transport, Inc., 93-STA-23 (Sec'y April 6,1994). Moreover, as discussed previously, complainant is not required to cite a specific motor vehicle standard or rule to be protected under 31105(a)(1)(A). His activity is protected under this provision even if the underlying complaint proves to be meritless. Hernandez v. Guardian Purchasing Co., 91-STA-31 (Sec'y June 4, 1992), slip. op. at 3, N. 1; Nix v. Nehi-RC Bottling Company, 84-STA-1 (Sec'y July 13, 1984), slip op. at pp. 8-9.

For several reasons, however, I do not accept that Mr. Michaud registered internal complaints cognizable as protected activity under the Act. First, there is no corroboration whatsoever for Mr. Michaud's testimony. This lack of corroboration is troubling, given that complainant contends that at least one driver, Larry Roy, was present during the "refusal" conversation with Kasny in late November 1993 [TR 110]. Nor was "Susan" from DOT further identified or called to testify. Mr. Michaud's testimony stands alone and directly contradicted by three witnesses.[8] Kasny, Andrews and Greany denied that the hours of service subject came up, although they recalled a number of occasions when complainant discussed the "vicious cycle." Other discrepancies indicate that complainant's memory of the events is perhaps more as he wishes they had occured, rather than how they actually occured. For example, Dave Andrews recalls telling complainant that his desire to have the day shift trucks come in earlier was not workable because the customers dictate the volume of freight [TR 622-625]. Greany echoed this fact of business life [TR 727-729]. Yet Mr. Michaud testified that Andrews agreed with him about bringing the day trucks in earlier. Another discrepancy is that Kasny and Andrews deny talking to complainant about the New Hampshire Railway Act, but complainant may have talked to another driver, Jeff Labreque, about it [TR 167-8].

Second, Mr. Michaud's own testimony was extremely vague and often tangential. He spoke haltingly about key events, and was frequently unable to remember dates, and who

[8]Jeff Labreque testified that he heard other drivers complain about hours of service problems, but never to BSP management. He also said that BSP never expressed concern about possible violation of hours of service regulations. However, this testimony was stricken [TR 155-156]. There is no evidence other than complainant's testimony touching directly on drivers complaining about hours of service problems to BSP management.

said what. It is unnecessary to determine whether his lack of clarity stems from conscious dissembling, for Mr. Michaud himself admitted that his mental state causes his mind to wander and lose focus [TR 83, 86, 170, 186]. As a result, he is not a reliable witness.

Third, complainant's statements about the "vicious cycle" and getting his run accomplished centered primarily on his extra job assignments and concern with making more money, rather than on perceived safety or hours violations. Mace v. ONA Delivery Systems, Inc., 91-STA-10 (Sec'y January 27, 1992).

Finally, the fact that Mr. Michaud kept his alleged early contacts with the DOT and state trooper a secret from BSP management suggests that he either did not make those contacts at all or that he was not really seriously concerned about management making a change. In this regard, I find complainant's testimony contradictory and not at all reconcilable. Complainant testified that ***before*** his October review, he instituted a conversation with a state trooper about the hours of service rules; again, he was very vague about the when, where and what of these contacts [TR 86, 88-89]. However, he claims that he did not see the document that "jogged his memory" and "concern" about the hours of service rules [CX 2, last page] until the October review itself [TR 74-76, 78-80]. There is no explanation for why, if he had no concern about the hours of service violation until the review, he supposedly called the DOT and stop a state trooper *before* that time. Even assuming he telephoned DOT and contacted the trooper after the review, it is undisputed that he did not disclose the company's name to state or federal authorities, nor tell BSP about the contacts [TR 184-186]. A reasonable inference is that his level of alleged concern was somewhere between minimal and none. The evidence leaves it very uncertain whether Mr. Michaud actually contacted DOT or spoke to a state trooper.

In short, I find that Mr. Michaud was engaged primarily in a struggle to get his point across to Alex Kasny, who was simply too new in his job to handle the situation well. While this may have been poor management, along with an interpersonal struggle, it was not about DOT hours of service violations. Rather, the record convinces me that the hours-of-service issue was incidental and, more likely than not, after the fact of discharge. For these reasons, I conclude that the complainant has not shown by a preponderance of the evidence that he registered internal complaints cognizable under the Act.

(ii) "refusal"

Mr. Michaud claims he did not wish to begin his shift two hours earlier, as requested by Kasny in late November 1993, because of an hours of service concern. His testimony was:

> " .. after the union vote and Michael Greany had come in just before Thanksgiving, they were afraid of losing ... a substantial customer. That would be probably that way. ... And he says, we'd probably be working real crazy hours, and we were a brunch of drivers when he pulled us in to let us know. ...
>
> ***
>
> ... then after that, Alex Kasny, within that week or something, Alex Kasny brought -- when I came in to punch in my time card, it showed the next day that I was supposed to come in at 3:00, because he sets the time clocks, you know, what you're supposed to do and all of that. I says, how can I come in at 3:00? So, I went into his office. He brought us -- no, I'm sorry. He brought us in, me and Larry Roy, to let us know more about that later on. And we got -- went into the office, and he sat us down. And he says, we need somebody to do the pedal runs from 3:00 to about 5:00 ... And I said, I can't do that. He says, why not? I says, because from 3:00 -- if you promise me I'll get out when I'm finished with my run and everything from Logan at 3:00, then I will do it. But if you ... "

According to Mr. Michaud, Kasny's response was extremely gruff:

> " ... And he says, we can drive as many hours as we want. And I says, I beg to differ. And I says, I'm not going to do it. And he turned around, he said, I'm telling you, if I tell you to come in at 3:00, you're going to come in or else..."

[TR 106-109]. Complainant concedes that his immediate supervisor, Glenn Osterberg, re-arranged the schedule the very next day to accommodate his concern about Kasny's request to come in earlier [TR 232-233].

The Act prohibits an employer from discharging an employee for refusing to operate a vehicle in violation of the hours-of-service regulations at 49 C.F.R. Part 395. Ass't Secretary and Brown v. Besco Steel Supply, 93-STA-30 (Sec'y January 24, 1995); Settle v. BWD Trucking Company, Inc., 92-STA-16 (Sec'y May 18, 1994); Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Sec'y August 31, 1992). However, when the reason for refusal is a personal economic one, or where the driver fails to adequately convey that safety is the

basis for his refusal, his activity is not protected under the Act. Paquin v. J.B. Hunt Transport, Inc., 93-STA-44 (Sec'y July 19, 1994); Waldrep v. Performance Transport, Inc., 93-STA-23 (Sec'y April 6, 1994). Moreover, the Act does not protect refusals that are only incidentally related to regulatory violation concerns. Kanavel v. U-Haul Co. of Northwestern Ohio, 88-STA-9 (Sec'y October 24, 1988).

For the reasons stated above, I find that the evidence does not establish a refusal based on safety or hours of service concerns. Mr. Michaud actually did not refuse at all. He said he would do the early run beginning at 3:00 p.m. if he could complete them by 3:00 a.m. Though he and Kasny had words about it, Osterberg changed the arrangement the very next day and complainant never did have to confront the situation. Even if Mr. Michaud had "refused," I find that his statements to Kasny were not so much about hours of service as they were about who was going to determine his schedule, assignments, and how he was to perform his job.

In addition, to come within the protection of § 31105(a)(1)(B)(I) of the Act [the "when" clause], complainant must demonstrate that an actual violation of a Federal regulation would have occurred had he not refused to operate the motor vehicle as directed by BSP. Nolan v. AC Express, 92-STA-37 (Sec'y January 17, 1995), slip op. at 6. A complainant's unsubstantiated opinion that a violation would have occurred had he driven as requested by management, even if reasonable and made in good faith, is insufficient to invoke protection under this provision. Ass't Sec'y & Vilanj v. Lee & Eastes Tank Lines, Inc., 95-STA-36 (Sec'y April 11, 1996); Brame v. Consolidated Freightways, 90-STA-20 (Sec'y June 17,1992), slip op. at 3. Rather the complainant must prove that his assessment of the unlawful situation was correct. Brame, *supra*; see also Doyle v. Rich Transport, Inc., 93-STA-17 (Sec'y April 1, 1994), slip op. at pp. 2-3 (complainant must prove conclusively that condition violated Federal safety regulation); Yellow Freight system, Inc. v. Martin, 983 F.2d 1195, 1199 (2d Cir. 1993) (driver must show that operation would have "been a genuine violation of a federal safety regulation at the time he refused to drive.").

The evidence establishes that there had been violations of the 60/7 and 12 hour rules at BSP, in that drivers reported off duty more than 12 hours after coming on duty, without being required to maintain a log [CX 11; TR 650, 784]. Mr. Michaud's claimed concern for a potential 12 hour violation can certainly be termed reasonable or in good faith, given his testimony that he thought he would be required to drive a 14 or 16 hour shift.[9] However, that

[9]I note that Mr. Michaud's understanding of the hours of service regulations is incomplete. His view is that working more than 12 hour shifts on the 100-air mile radius runs is illegal, independent of the log issue. Nevertheless, there are numerous instances in the record before me, including testimony by BSP witnesses, that

was not what Kasny testified he had in mind; his proposal was to move the entire shift forward two hours, not to extend the shift two hours [TR 534]. Under the circumstances, complainant has not proven that his assessment of the situation was correct and that a violation of hours of service would have occurred. According to Kasny, his proposal was actually implemented later, with great success [TR 484-490].

(2) Motivation:

whether the evidence establishes that BSP's motivation was legitimate, pretextual, or mixed?

Complainant refutes the proffered explanation**,** arguing that it is pretextual because, among other things, BSP has changed its position over time about the motivation for his discharge. Whereas previously the company was concerned about time cards and "other documents," now it claims that its concern was only with the manifests. Complainant is correct that an employer's "switching" positions casts doubt on the claimed legitimacy of its reason for discharging an employee.

It is undisputed that the person who made the decision, and the only person with authority to make the decision, to discharge Mr. Michaud was Michael Greany. While complainant may have had his differences with Kasny, nothing in the record shows that those differences had occurred with Greany. Greany has consistently maintained that his concern, and that of company owner Jack Law, was with the dissemination of information from the manifests that could be helpful to a competitor. As in Waldrep v. Performance Transport, Inc., *supra*, 93-STA-23 (Sec'y April 6, 1994) slip op. at p. 5, there is no reliable evidence that Greany knew about any "hours of service" complaints by complainant. While complainant dwelt on the written statements about the events of December 23 1993 [see, for example, TR 587-590] the statements of Kasny and Osterberg substantiate that they confronted Michaud on the morning of December 23, 1993 about copying time cards and manifests, and he dodged their questions [CX 14, 16,. 17], as he himself admitted in his own testimony. I am therefore unable to find that BSP has switched its positions.

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drivers were running more than 12 hours and never required to prepare logs. Therefore Mr. Michaud's incomplete understanding of the regulations is of little moment, except insofar as it may explain the persistence in his own behavior, per his own testimony.

I do find that the "information relay" from Vaughn to Andrews to Kasny to Greany contained flaws. First, I credit Danny Vaughn's statement only to the extent that (1) he saw Mr. Michaud photocopying in the early morning hours of December 23, 1993; and (2) he told Andrews and Kasny that he had seen complainant photocopying time cards and manifests [TR 671-674]. I credit these assertions only because Mr. Michaud admits to the former, and because Andrews corroborates the latter [TR 625-629]. The remainder of Vaughn's testimony is entirely discredited by the fact that Mr. Taylor could not have been present at the time of the event [TR 833], despite the fact that the witness described Taylor's actions in detail [TR 698-711]. Vaughn is either dissembling, or recollecting some other night when Michaud and Taylor may have made photocopies at the same time [TR 835].

Second, Andrews conveyed misinformation to Kasny, relaying that Vaughn had seen Taylor and Michaud acting suspiciously, as if they were trying to hide something [TR 636-638]. Vaughn denies this [TR 704]. However, this is of little moment because Kasny did not relay the information on to Greany [TR 777], and it therefore could not have formed a part of his thinking in discharging complainant.

Third, Kasny's testimony was that Vaughn confirmed he had seen Michaud making copies of time cards and "other paperwork," which he thought were manifests, out of the files. These are the files where the manifests are kept [TR 590], and Kasny assumed without knowing for a fact that indeed manifests were being copied. [TR 498-511, 574-590, 603-609]. The evidence is unclear whether claimant actually photocopied manifests other than his own. However, for Kasny to conclude that he was doing so was not unreasonable under the circumstances, given what Vaughn had told him and particularly given the confirmation of complainant's own evasive conduct when confronted about it.

As a result, I conclude that any flaws in the information relay do not materially diminish the legitimacy of Greany's motivation for discharging complainant. On the morning of December 23, 1993, Greany either already knew of, or was informed of these specific facts: that Michaud was disgruntled because he was complaining about working long hours for not enough money, that he had personal financial worries, that he was seeking a job elsewhere, that he had been caught photocopying company documents out of company files containing information valuable to potential competitors, and that he had evaded direct questioning when confronted about the situation.

One can theorize about the possibility of a "conspiracy" among Vaughn, Andrews and Kasny. Yet the evidence does not rise above a possibility and certainly does not become a probability. Moreover, even if there had been an out-and-out conflict between Kasny and

Michaud about hours regulations [as opposed to getting the job done efficiently], the decision maker himself knew of no underlying hours of service problem.

Complainant also suggests that the manifests cannot be considered to have been confidential documents, and thus the motivation is pretextual. That they are not confidential, I agree. The evidence showed that BSP did not treat them as confidential, nor maintain any policy to assure their integrity -- other than keeping them in file cabinets. Mr. Greany considered them confidential, a status he felt was implied rather than explicit [TR 798-800]. However, the fact that business records are not maintained as confidential does not detract from the legitimacy of a business' concern about their potential misuse in the hands of a disgruntled employee.

There is insufficient evidence to establish by a preponderance that the motivation for discharging Mr. Michaud was anything other than legitimate.

In view of my findings concerning protected activity and motivation, the burden does not shift to BSP to show that it would have discharged complainant in the absence of protected activity. It is therefore unnecessary to determine the facts under the "mixed motive" standard.

(3) Causal nexus:

whether the evidence establishes that BSP discharge of complainant was motivated at least in part by his having complained about hours of service violations?

As indicated above, there was perhaps some animus between Kasny and Michaud, and perhaps Michaud had irritated Osterberg and Andrews as well. However, that irritation cannot be fixed on alleged complaints about hours of service, given the record before me. Mr. Greany testified that he fired complainant because of his unauthorized copying of sensitive documents. It is well established that an adverse employment action immediately after the employee engages in totally unprotected conduct militates against a causal nexus. Gibson v. Arizona Public Service Co., 90-ERA-29, 46 and 53 (Sec'y September 18, 1995); Etchason v. Carry Companies of Illinois, Inc., 92-STA-12 (Sec'y March 20, 1995). Moreover, three additional factors effectively sever any inference of a causal connection. First, if Mr. Michaud's timetable of the facts is believed, he began to complain about hours of service problems after his October 1993 review. But he was not discharged for more than two months, during which time he received a raise, and Glen Osterberg "went to bat" for him in terms of Kasny's request that he begin his shift two hours earlier. Second, the very event

that complainant alleges triggered his discharged -- his being discovered photocopying documents in preparation, he says, for a DOT complaint -- is precisely what he concealed from Kasny and Osterberg. By his own admission, no one at BSP knew of his intent to file such a complaint, nor event that he had spoken to DOT or state personnel previously. Greany simply could not have known, nor could he have been motivated, by a fact that Mr. Michaud intentionally concealed. Three, even Mr. Michaud seems to have understood that if he got caught copying company records, it was a reason for discharge [TR 189-190].

When one couples Mr. Greany's stated reasons for the discharge with the fact that the discharge followed immediately on the heels of complainant's secretive photocopying activities; that he was not discharged immediately after he allegedly began to bring up hours of service violations; and that he actively concealed the allegedly protected reason for photocopying the documents, the most reasonable inference is that Mr. Michaud's "blowing the whistle" did not lead to his discharge.

IV. RECOMMENDED ORDER

For the foregoing reasons, the undersigned recommends that the Secretary **ORDER** that the complaint of Robert Michaud alleging discrimination under the Surface Transportation Assistance Act be **DENIED** and **DISMISSED**.

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Christine McKenna
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave. N.W., Washington, D.C. 20210. The Administrative Review Board has the authority to issue final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978-19989 (1996).